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CHARLES ELMORE

No. 466

In the Supreme Court of the United States

OCTOBER TERM, 1932

ESTHER JACKSON PORTER, AS EXECUTRIX ET AL., PETITIONERS

v.

DAVID BURNET, COMMISSIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF

MERRILL S. JUNE,

Counsel for Reginald Washburn et al., as Amicus Curiae.

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May it Please the Court:

The undersigned, as counsel for REGINALD WASHBURN et al., executors under the will of Charles G. Washburn, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

MERRILL S. JUNE,

Counsel for Reginald Washburn et al., as Amicus Curiae.

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 466

ESTHER JACKSON PORTER, AS EXECUTRIX ET AL., PETITIONERS

v.

DAVID BURNET, COMMISSIONER

BRIEF OF MERRILL S. JUNE, as AMICUS CURIAE

PRELIMINARY STATEMENT

The instant case presents the question whether under Section 302 (d) of the Revenue Act of 1926, there should be included in the gross estate the value of property transferred by a decedent in trust, but subject to the power of the decedent to modify the trust except in his own favor. In 1930 this exact question was decided by the Circuit Court of Appeals for the First Circuit in *Brady* v. *Ham*, 45 F. (2d) 454, holding the value of such property was not to be included in the gross estate. In *White* v. *Erskine* (C.C.A. 1st), 47 F. (2d) 1014, decided in 1931,

where there was involved the question of the power of the decedent grantor with the consent of the trustee to make limited changes, the same court again considered Section 302 (d) and stated:

> "To hold that Congress under subdivision (d) intended under the guise of a tax on the transfer of property at death to impose a tax solely on a limited power of alteration of a trust, or a limited power of appointment under it, would be contrary, not only to the spirit of the Act, but the express terms of Sec. 301. * * * "

The Government did not seek a review of either of these decisions and these questions have since been considered settled in the First Circuit.

The District Court for the District of Massachusetts relying upon the decision of *Brady* v. *Ham*, on November 29, 1932, gave judgment for the plaintiffs in a similar suit for the refund of federal estate taxes (Law No. 5103, *Reginald Washburn* et al., *Executors* v. *White*, reported in 1933 C.C.H. Federal Tax Service, Paragraph 9018), in which the undersigned is counsel for the plaintiffs. The Government has now indicated that this decision will be appealed. Since the instant case of *Porter* v. *Burnet* will have the effect of a review of *Brady* v. *Ham* as far as the authority of the latter case is concerned and affect the pending case of *Washburn* v. *White*, counsel as amicus curiae desires to submit the following argument in support of the petitioners.

ARGUMENT

I

THE DECEDENT HAD NO INTEREST IN THE TRUST PROPERTY AT HIS DEATH

As the Government conceded in its brief below, the value of the trust property cannot be included in the gross estate if the transfers were complete when made. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, as to the "five trusts" there involved; *Heiner* v. *Donnan*, 285 U. S. 312. We submit that this transfer was complete when made and an inter vivos transfer in so far as the decedent's property interest was concerned. The Government contends that the possibility of a return of the trust property to the grantor through some ingenious scheme for the termination of the trust is enough to constitute the trust property part of the decedent's estate for tax purposes. The terms of the trust provide for no such return of the property to the decedent. In fact, the express terms prohibit a return to the decedent. Where, as in this case, the reserved power is limited by excepting any alteration in the grantor's favor, and the trustee is not the grantor of the trust, such a termination as would revest the trust property in the grantor would be such a fraud on the power that the trustee as a practical matter would contest and a court of equity would prevent its accomplishment. This practical objection to the Government's argument is especially forceful in such modifications of the instant case as *Washburn* v. *White*, *supra*,

where one trustee was also one of the beneficiaries of the trust. Congress by the estate tax provisions of the Revenue Acts intended to have included in the gross estate property owned by the decedent at death, not property of others which he could have secured before his death by fraud or sharp practice. In fact this decedent cut himself off from any beneficial interest in the property. This completed his part of the transfer. The interest of any given beneficiary might be disturbed, but the grantor had finally parted with his interest in the trust property.

II

IT IS IMMATERIAL THAT THE BENEFICIARIES' INTERESTS COULD BE DISTURBED

Were the federal estate tax a tax on the succession to property, there might be weight attached to the fact that the beneficial interests under the trust could be modified before the decedent's death or that the interests of any one or more of the beneficiaries were in suspense, dependent, in the words of Section 302 (d), on "the exercise of a power, either by the decedent alone *or in conjunction with any person*" (Italics ours). Parenthetically, it is to be noted that interesting questions will arise where one party to the power is a trustee or beneficiary, whether the tax be an estate or a succession tax. Such lack of finality as to beneficiaries other than the decedent is of no importance in determining whether the decedent had finally parted with his interest in

the property. But of great importance is the question, whether the Government seeks in the instant case to erase the distinction between the estate tax and the succession tax. In the Massachusetts District Court in *Washburn* v. *White*, its attorneys argued (page 10 of their brief) that "The Federal estate tax is an excise imposed upon the privilege of directing the course of succession to property." Certainly in 1928 when this Court decided *Saltonstall* v. *Saltonstall*, 276 U. S. 260, this was not the accepted view of this Court. In that case the Massachusetts succession tax was held constitutional and was characterized by this Court as "a tax on the privilege of succession" in a sharply expressed distinction to the federal estate tax "on the privilege of transmission." It seems probable that had the tax there involved been an estate tax, it would have been invalidated. The nature of the estate tax has been defined many times by this Court. See *Y. M. C. A.* v. *Davis*, 264 U. S. 47; *Shukert* v. *Allen*, 273 U. S. 545; *Coolidge* v. *Long*, 282 U. S. 582. The most recent decisions of this Court indicate no change from the view that death must be the occasion of the passage of the property rights *from the decedent* in order to give a basis for the imposition of the estate tax on those property rights. *Tyler* v. *United States*, 281 U. S. 497; *Gwinn* v. *Commissioner*, decided December 5, 1932; *Third National Bank and Trust Company* v. *White*, decided December 19, 1932. In these cases, the decedent had definite property rights

for his own benefit which shifted from him at death. Counsel has, of course, this distinction between estate and succession taxes constantly before him in his practice in Massachusetts where it has been well established for years. See *Leach* v. *Nichols*, 285 U. S. 165, and Massachusetts cases cited in the opinion. If such cases as the Saltonstall case are still authority, it would seem to follow that any argument by the Government seeking to erase this distinction and to sustain this tax on the ground that the decedent retained a right to direct the course of succession to his property is unsound. The federal tax is not upon such a right. It is an excise tax on the transfer *from* the decedent, and whether the beneficiaries' interests could be disturbed is immaterial.

III

OTHER QUESTIONS ARE INVOLVED

Counsel is not unmindful that there are other questions involved. In the instant case, and in *Washburn* v. *White*, the transfers were made before the enactment of Section 302 (d) and before the similar provisions of prior Revenue Acts. Neither transfer was in contemplation of death nor in close proximity to death and the reserved power in each case, whatever its value at decedent's death, was not a power to make "any change" in an unlimited sense. The sub-paragraph (d) contains two sentences of ambiguous and difficult construction. Counsel for the petitioners and for the Government

in the instant case deal with these serious questions, but the undersigned counsel desires to emphasize particularly by this brief the distinction heretofore established between estate and succession taxes, which he submits should be upheld in this case.

CONCLUSION

The judgment of the Circuit Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

MERRILL S. JUNE,

Counsel for Reginald Washburn et al., as Amicus Curiae.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 466.

ESTHER JACKSON PORTER, AS EXECUTRIX, AND RICHARD L. DAVISSON, AS SURVIVING EXECUTOR, OF THE WILL OF WILLIAM H. PORTER, DECEASED, *Petitioners,*

against

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FILED BY LEAVE OF COURT.

J. DUPRATT WHITE,
as *amicus curiæ.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

ESTHER JACKSON PORTER, as Executrix, and RICHARD L. DAVISSON, as Surviving Executor, of the Will of WILLIAM H. PORTER, deceased,
Petitioners,

AGAINST

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FILED BY LEAVE OF COURT

This brief is directed solely to the question of the proper *construction* of Section 302(d) of the Revenue Act of 1926. We believe there are no less, and no more, than four possible constructions of this statute, viz:

The words "any change" may mean

I. Any change however slight;

II. Any change without limitation, that is, the word "any" is a synonym for "every";

III. Any change whereby the interests of the beneficiary may be *substantially* affected, regardless of effect upon the grantor;

IV. Any change whereby the grantor can secure to himself economic enjoyment from the trust property.

The first two constructions are literal. The last two involve limitations which are not specifically expressed. Constructions I and II, if constitutional, would render the trusts taxable. Under Constructions II and IV, they would be excluded from the gross estate.

CONSTRUCTION I

The words "any change" mean any change however slight.

It is respectfully submitted that this construction is not tenable. Carried to its logical conclusion it would mean that a trust could be taxed when the power to change is so limited as to be practically inconsequential, either to the grantor or to the beneficiary. Such an interpretation would render the statute arbitrary and capricious in the extreme, and probably unconstitutional. (*Knowlton* v. *Moore*, 178 U. S. 41, 76, 77; *Barclay* v. *Edwards*, 267 U. S. 442, 450; *Brushaber* v. *Union Pacific Railroad Company*, 240 U. S. 1.)

A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score. (*Panama Railroad Co.* v. *Johnston*, 264 U. S. 375, 390; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401; *Lewellyn* v. *Frick*, 268 U. S. 238.)

Therefore, we submit, this literal but narrow and harsh construction should not be adopted. There are certainly other interpretations which are more reasonable.

CONSTRUCTION II

The words "any change" mean any change without limitation, that is, the word "any" is a synonym for "every".

This likewise is a literal interpretation. It will scarcely be disputed that "any" is sometimes used as a synonym for "every". Hence, the statute is open to the charge of being ambiguous, and the rule of resolving doubt in favor of the taxpayer immediately suggests itself. (*Gould* v. *Gould*, 245 U. S. 151; *United States* v. *Merriam*, 263 U. S. 179.)

It is noteworthy that this construction would square with expressions of this Court as to the proper scope of the Federal estate tax (*Chase National Bank* v. *United States*, 278 U. S. 327; *Reinecke* v. *Northern Trust Company*, 278 U. S. 339), and, being literal, it might well come within the rules applicable to the interpretation of the language of taxing statutes laid down in *Crooks* v. *Harrelson*, 282 U. S. 55.

CONSTRUCTION III

The words "any change" mean any change whereby the interests of the beneficiary may be substantially affected, regardless of effect upon the grantor.

Any interpretation, except Constructions I and II, requires reading something into the statute, some qualification or limitation which is not specifically expressed.

Assuming Construction I is unsound, we respectfully submit the only construction which is at all reasonable and which favors the Commissioner's position is Construction III. In order to justify this interpretation, however, we submit there must be a clear indication that the statute was intended to be so construed.

Examining the evidence as to intention, there would seem to be nothing to support this construction and ample grounds for its rejection. Consider that the whole scheme of the Federal estate tax law is that of an estate tax and not a succession tax. It is not lightly to be assumed that this subdivision of the statute was intended to impose an excise with respect to the exercise of a privilege (right to succession) which is the converse of the privilege (right to transfer) with respect to the exercise of which the balance of the statute imposes an excise.

Any doubt should not survive consideration of the fact that the framers of the statute in proposing its adoption clearly indicated they had in mind the situation of a *revocable* trust.*

---

* Ways and Means Committee Report to the House of Representatives, 68th Congress, Report 179, p. 65, recommending the enactment of Section 302(d) in the Revenue Act of 1924.

This interpretation would result in the imposition of a transfer tax on the estate measured by property which, neither in a legal nor a practical sense, constitutes part of the estate. As so construed, the statute is so arbitrary and capricious as to make the question of constitutionality a very lively issue. It would therefore seem in order to invoke against this interpretation the rule that a construction which raises grave doubts as to constitutionality is, if possible, to be avoided. (*Panama Railroad Co.* v. *Johnston, supra; United States* v. *Jin Fuey Moy, supra; Lewellyn* v. *Frick, supra.*)

CONSTRUCTION IV

The words "any change" mean any change whereby the grantor can secure to himself economic enjoyment from the trust property.

This, we respectfully submit, is the proper construction. It is in harmony with the theory of the statute, with the expressed views of the draftsmen of the law, and with the statements of this Court from *Knowlton* v. *Moore*, 178 U. S. 41, to *Heiner* v. *Donnan*, 285 U. S. 312.

It does not subject the statute to the danger of unconstitutionality nor does it condemn it to the rigidity of literalness, with consequent absurdities when applied to particular cases. Instead, it permits of a flexibility which will be an adequate safeguard against capricious results. Finally, it meets the rule of construction in favor of the taxpayer.

It may be suggested that in view of *Reinecke* v. *Northern Trust Company*, this interpretation produces the result that

Section 302(d) does not enlarge upon Section 302(c), whereas the existence of the two sections indicates an intention that the one should cover cases not affected by the other. The answer to this is that until the Supreme Court's decision the lower courts had held that a revocable trust was not taxable under Section 302(c). [*Reinecke* v. *Northern Trust Company*, (C. C. A. 7) 24 F. (2) 91; *Stark, et al.* v. *United States*, (D. C.) 24 F. (2) 237.] As the draftsmen of Section 302(d) expressly said, that Section was intended to tax revocable trusts. *After* Section 302(d) was passed, the Supreme Court (*Reinecke* v. *Northern Trust Company*, 278 U. S. 339) held revocable trusts were taxable under Section 302(c). In view of this order in the development of the case and statutory law, we submit the passage of Section 302(d) does not indicate that Congress thereby intended to go further than *Reinecke* v. *Northern Trust Company*.

The Court is urged to adopt Construction IV.

Respectfully submitted,

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